

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0558, Charles Santiago & a. v. Associated Radiologists, P.A. & a., the court on May 4, 2005, issued the following order:

The plaintiffs, Charles Santiago and Patricia Santiago, appeal an order of the trial court finding that the statute of limitations barred their negligence action and granting the motion for summary judgment filed by the defendants, Associated Radiologists, P.A. and Robert Bertagna, M.D. On appeal, the plaintiffs contend: (1) there was a material factual dispute as to whether they exercised reasonable diligence in relying upon the assurance of their treating physician that no mistake had been committed; (2) there was a material factual dispute as to whether their action was filed within three years after they discovered or in the exercise of reasonable diligence should have discovered the injury and the causal relationship to the act or omission complained of; and (3) the court applied an incorrect formulation of the discovery rule. We affirm.

In reviewing the trial court's grant of summary judgment, we consider the affidavits and all inferences properly drawn from them, in the light most favorable to the non-moving party. Marikar v. Peerless Ins. Co., 151 N.H. 395, 397 (2004). If there is no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, the grant of summary judgment is proper. Id. We review the trial court's application of the law to the facts de novo. Id.

To be timely, a negligence action must be brought within three years of when it arose; a negligence action arises when causal negligence is coupled with harm to the plaintiff. Pichowicz v. Watson Ins. Agency, 146 N.H. 166, 167 (2001). Under the discovery rule, when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the limitations period will only begin to run when the plaintiff discovers, or in the exercise of reasonable diligence, should have discovered, the injury and its causal relationship to the act or omission complained of. Big League Entm't v. Brox Indus., 149 N.H. 480, 485 (2003). This rule has two elements which must be satisfied before the statute of limitations begins to run: (1) the plaintiff must know or reasonably should know it has been injured; and (2) the plaintiff must know or reasonably should know that its injury was proximately caused by conduct of the defendant. Id. Because the discovery rule is equitable in nature, any factual findings required for a determination of its applicability are to be made by the trial judge. Keshishian v. CMC Radiologists, 142 N.H. 168, 179 (1997).

In Case No. 2004-0558, Charles Santiago & a. v. Associated Radiologists, P.A. & a., the court on May 3, 2004, issued the following order:

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In this case, the plaintiffs concede that they were aware of their injury within days of their daughter's birth. The record also contains evidence that they consulted with many physicians over the ensuing months about treatment for her conditions. With the exception of the obstetrician who supervised Mrs. Santiago's pregnancy, the plaintiffs failed to ask any of these experts whether their daughter's conditions should have been discovered during one of the ultrasounds. Even viewing the evidence in the light most favorable to the plaintiffs, we find no error in the trial court's ruling that the plaintiffs' action was filed more than three years after they should have discovered the possibility of a causal connection between their injury and the defendant's alleged negligent acts. See Pichowicz, 146 N.H. at 168 (plaintiffs need not be certain of causal connection between injury and alleged negligence; existence of possibility sufficient).

Given our conclusion that application of the discovery rule did not make this action timely, we need not address the plaintiffs' remaining argument.

Affirmed.

NADEAU, DALIANIS and DUGGAN, JJ., concurred.

**Eileen Fox
Clerk**

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